NO. 17903

IN THE

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

JACK PAUL KOURKENE,

Appellant,

vs.

AMERICAN BBR, INC., a Pennsylvania corporation,

Appellee.

APPELLANT'S PETITION FOR REHEARING

LEO E. ARNOLD, JR.

BARBAGELATA, ZIEF & CARMAZZI
109 Geary Street
San Francisco, California

Attorneys for Appellant Jack Paul Kourkene

NO. 17903

IN THE

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

JACK PAUL KOURKENE,

Appellant,

vs.

AMERICAN BBR, INC., a Pennsylvania corporation,

Appellee.

APPELLANT'S PETITION FOR REHEARING

To the Honorable, Oliver D. Hamlin, Jr., Charles M. Merrill, Circuit Judges, United States Court of Appeals for the Ninth Circuit and the Honorable M. D. Crocker, United States District Judge.

Jack Paul Kourkene, Appellant, by his attorneys, respectfully petitions this court for a rehearing of the above entitled case in which this court rendered its decision on January 15, 1963, and in support thereof, presents the following reasons:

In reaching its conclusions herein that Appellee, American BBR, Inc., "was not doing business in California," we

respecfully submit that the court did not consider all of the relevant facts bearing on this issue, and, therefore, the decision is based on various conclusions which are contrary to the evidence presented. If all of the relevant facts are taken into consideration, it will be obvious that the Appellee is, in fact, "doing business in California," so as to be required to defend this action here.

It is asserted in the decision that Appellant's cause of action did not arise out of or result from any of the "few isolated activities on the part of Appellee in California." If we consider only the various activities of Appellee set forth in the opinion, we may agree that this conclusion reached by the court was correct. However, Appellant's claim against the Appellee is based on the fact that Appellee, as the agent of the Swiss defendants, entered into a contract with Ryerson, which contract arose directly out of and as a result of Appellant's activities in California. Although it may be true that Appellee is not responsible for all of the conduct of the Swiss defendants, such as the conspiracy and fraud counts set out in the Complaint, it is true, however, that if Appellant proves his claim for breach of contract, i. e., for his share of the royalties paid to Appellee by Ryerson, then Appellant is entitled to a judgment against Appellee, since Appellee is a party to the contract with Ryerson on behalf of the Swiss defendants. The effect, therefore, is that the activity of the Swiss defendants and of Appellant in

California becomes the activity of Appellee in California, and since Appellee receives the benefits of this activity, it must assume also, the obligations thereof. One of these obligations is to defend this action in California where the activity from which it benefited took place. Appellee has not and cannot deny that it has derived and is deriving a very valuable business benefit from the services rendered by Appellant in California, which gave rise to the license agreement between it and Ryerson.

The opinion also states that Ryerson sells the BBRV method solely for its own account to its own customers, without any direction or control by Appellee. The facts show however, that Appellee directly assists Ryerson in the application of the BBRV method by supplying Ryerson with an engineer and by training Ryerson's employees. Appellee is also protected in its agreement with Ryerson to see that Ryerson uses the method properly. Moreover, Ryerson's customers are also directly customers of Appellee, since Appellee receives absolutely no benefit from its agreement with Ryerson until a customer for the BBRV method is found and royalties are paid to Appellee only on the wire used in each individual project.

While it is true, as the decision states, that Appellee does not manufacture or distribute any product in California, it does have its product manufactured and distributed for it in California by Ryerson. Thus, Appellee's "contacts" with California exist one way or the other and for precisely the same purposes.

The differences are differences only in form and description. Appellee derives exactly the same, if not more, business advantage in California because of its arrangements with Ryerson.

The decision of the court does not at all consider the following facts:

All the relevant facts for the action took place in California, and, therefore, it will be more convenient for all parties to try the case here, because of the availability of evidence; Appellant is now and at the time that the cause of action arose, was a resident of California; there is no forum, except California, in which all of the defendants can actually be sued at one time, and, therefore, multiplicity of suits must result if it is not maintained here.

If the above referred to relevant facts are considered by the court and the erroneous conclusions thus corrected, a result contrary to that reached by the court would be required. Accordingly, we respectfully request this court to grant this Petition for Rehearing.

CERTIFICATE OF COUNSEL

The undersigned, attorney for Jack Paul Kourkene, Appellant, hereby certifies that the foregoing Petition is not presented for the purpose of delay or vexation but is, in the opinion of counsel, well founded and proper to be filed herein.

Respectfully submitted,

LEO E. ARNOLD, JR.
BARBAGELATA, ZIEF & CARMAZZI
109 Geary Street
San Francisco 8, California